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Rules and Directives  
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March 28, 2002

12/14/01  
66 FR 64890  
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Michael Lesar, Chief  
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Division of Administrative Services  
Office of Administration  
Mail Stop T-6 D59,  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Re: Enforcement Program and Alternative Dispute Resolution Request  
for Comments (Federal Register, Vol. 66, No. 241, Dec. 14, 2001)

Dear Mr. Lesar:

The Nuclear Regulatory Commission ("NRC") has requested comments in connection with its evaluation of the use of Alternative Dispute Resolution ("ADR") in the NRC's Enforcement Program. I am submitting the following comments along with supporting materials for review and consideration of the use of ADR in a limited context.

I support the concept of exploring further the use of ADR in connection with 10 C.F.R. 50.7 issues, and offer no opinion on whether it would be appropriate in any other enforcement setting. I support it, in part, as a result of my own experience as a panel member of an experimental pilot program for the use of ADR at the Hanford Department of Energy site. While the regulatory context between the DOE and the NRC regulation in commercial reactor and materials settings has some significant differences, there are more similarities than differences in the application of employee protection laws and the implication of these laws on the work environment.

In fact, as is demonstrated by the opening paragraph in the attached law review article about a pilot ADR process at Hanford, it could be said that the differences between the DOE and NRC handling of discrimination issues are without significance:

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The patchwork of laws, regulations and programs available for “whistleblower” issues are seldom pathways to resolution. The outcomes, particularly in the more complex or polarized cases, reflect mutual defensiveness and conflict more than dialogue or denouement. While recent laws and regulations have strengthened the right to raise issues and early statutes established the grounds for a lawsuit, they have not provided a set of tools necessary to resolve the basic issues that arise when someone decides to blow the whistle or raise allegations of retaliation.

*“Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach”* by Jonathan Brock, as published in Washington College of Law Administrative Law Review, Volume 51, Number 2 (Spring 1999), at 498.

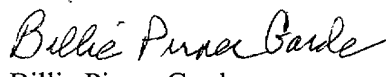

The most important difference between the DOE regulatory scheme addressing employee allegations of retaliation and the NRC process is that the NRC has the regulatory authority to take enforcement action against the licensee under 10 C.F.R. 50.7 and an individual manager under 10 C.F.R. 50.5 in cases where the agency has determined that retaliation has occurred. In the DOE context, action for similar violations would be handled through the contract management process and/or under 10 C.F.R. 708.

The main criticism about the potential use of ADR in the regulatory context raised at the recent ADR workshop was that the use of ADR would permit violators to negotiate their way out of public and regulatory accountability, and therefore only provide an incentive for licensees to “settle” early to avoid enforcement action. This criticism is founded in the misconception that ADR is simply a substitute term for private settlement of litigation. In fact, an ADR process can be whatever the parties decide it to be. At Hanford the stakeholders, with the help of a facilitator, crafted a model for ADR that addressed all of the issues usually raised by claims of retaliation, including issues about the impact of actions on the workforce, the accountability of the alleged perpetrator, and ensuring that the safety issue being raised was on an acceptable track to resolution. The process was founded on the principle that the public was best served by a timely, full, fair and final resolution to the employee concerns. The process has worked because the parties agreed, ahead of any specific dispute, to presumptively implement the recommendations of the ADR panel.

Over the past eight years the Hanford Joint Council has, in fact, resolved virtually every case that has come before it. The process produced a full, fair and final resolution that was implemented by the parties. Issues of public safety were disclosed and addressed, the terms of any private settlements treated under the DOL rules and procedures for such disclosure, and resolutions and implementations were monitored for compliance. The DOE utilized the process as one of the tools to achieve resolution of issues, while not abandoning its regulatory responsibilities. Issues of a potential criminal nature were referred to the DOE Inspector General in accordance with the responsibilities of the parties on the Council. In short, all of the issues that arose out of the employee allegations of mishandled worker concerns and retaliation were able to be addressed through the Council process, or in connection with the Council process.

I do not mean to suggest that the Hanford Joint Council for Resolving Employee Concerns would be exactly the right model for the NRC regulated industries, but the process by which an ADR pilot was identified would be appropriate to attempt to identify an ADR process for the NRC context. Having been a member of the Hanford Joint Council since 1993 I am confident that the issues of concern to the agency, the public interest and employee advocate community could be addressed in a model pilot program, and strongly urge such a process be considered. <sup>1</sup>

Sincerely,

  
Billie Pirner Garde  


Enclosures

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<sup>1</sup> The use of ADR was briefly considered, and rejected, in the April 2001 draft report of the Discrimination Task Force. For example, on the potential use of ADR in connection with employee discrimination claims the DTF draft report inexplicably concludes “[t]he use of ADR misses the point of the NRC’s interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process.” This statement reveals that there was little understanding of the significant role that ADR can play in the early resolution of employee concerns about HIRD and its implication. Its dismissal out of hand ignores that the DOE, which has virtually the same public health obligations and issues as the NRC, states that a “vital part” of its Employee Concerns program’s objective is to “avoid, where possible, prolonged and costly litigation by promoting the use of Alternative Dispute Resolution (ADR) including mediation.” See, *1999 Annual Employee Concerns Program Activity Report*, U.S. Department of Energy, Office of Employee Concerns, p.2. No comparison to the DOE was utilized in the draft Task Force report. I urge those reviewing the use of ADR to compare what the DOE is doing with ADR in the context of both employee discrimination and safety conscious work environment issues.

**COMMENTS OF BILLIE PIRNER GARDE TO  
ENFORCEMENT PROGRAM AND ALTERNATIVE  
DISPUTE RESOLUTION REQUEST FOR COMMENTS  
(Federal Register, Vol. 66, No. 241, Dec. 14, 2001)**

*Question 1: Is there a need to provide for additional avenues, other than that provided for in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?*

Answer: Yes. The use of Alternative Dispute Resolution in connection with individual's complaints of harassment, intimidation, retaliation or discrimination (HIRD) in violation of 42 USC 5851, as amended, and in addressing 10 CFR 50.7 issues would add a valuable tool in the enforcement process.

*Question 2: What are the potential benefits of using ADR in the NRC enforcement process?*

Answer: My comments are limited exclusively to the use of ADR in connection with addressing employee allegations of discrimination and related issues. The potential benefits from the use of ADR would be to provide an alternative avenue to a timely, full, fair and final resolution of employee complaints of retaliation. An ADR avenue could be developed that would include addressing the aspects of a retaliation complaint that deal with the potential "chilling effect" on the workforce by the complained of behavior, as well as the actions by the offending party. The benefit of achieving a timely, full, fair and final resolution of such complaints is the ability to preserve the employment, and often the career, of the employee who has raised the concerns, as well as limiting the negative impact on the entire work environment from protracted, controversial investigations and litigation.

*Question 3: What are the potential detriments of using ADR in the NRC enforcement process?*

Answer: The most serious potential detriment from the use of ADR in the context of resolving HIRD complaints is that private resolution of issues between an employee and his or her employer would be reached without regard to protecting the public health and safety or addressing the work environment issues raised by the complained of action. If ADR was utilized in lieu of enforcement action, that would be a very real concern. However, that detriment would be the consequence of having an ADR process that did not include or address the regulatory expectations, or attempting to replace, instead of supplement, the enforcement process towards an appropriate end..

*Question 4: What would be the scope of disputes for which ADR techniques could be utilized?*

Answer: I believe that the use of ADR in connection with HIRD issues or 10 CFR 50.7 issues has particular applicability and usefulness in meeting the Commission's goals of protecting public health and safety by recognizing and addressing the negative impact on a work environment caused by the untimely and adversarial nature of litigation between employees and management.

*Question 5: At what points in the existing enforcement process might ADR be used?*

Answer: In connection with 10 CFR 50.7 and "chilling effect" allegations I believe that ADR should be offered, or suggested, as a path at the initial NRC contact, i.e., within the same letter in which the NRC advises an employee of his/his rights under Section 211. I believe that ADR should be explained and offered as an option with a mechanism for selection of that option, and at any other point in the process.

*Question 6: What types of ADR techniques might most effectively be used in the NRC enforcement process?*

Answer: While there are an infinite variety of ADR techniques, I draw the attention of the reviewers to the attached law review article that describes an ADR pilot project at the Hanford Department of Energy site, "*Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach*" by Jonathan Brock, as published in the Washington College of Law Administrative Law Review, Volume 51, Number 2 (Spring 1999). This pilot project describes the process that was used to find a potential solution to the impact of whistleblower issues on the Hanford site. As noted in the article, ADR is not a "one size fits all" process. I encourage the reviewers of these comments to read the article as a demonstration of the type of solutions that can be developed to seemingly intractable problems.

*Question 7: Does the nature of the existing enforcement process for either reactor or materials licensees limit the effectiveness of ADR?*

Answer: The nature of the existing enforcement process for 10 CFR 50.7 allegations limit the effectiveness of ADR by creating a number of artificial barriers to resolution of these situations. Unlike

normal reactor or materials matters that involve technical and engineering issues, subject to scrutiny on technical data, HIRD issues are almost completely subjective. The subjective nature of the information and the difficulty in determining motive without a judicial or evidentiary hearing until the very end of the process, means that the existing process exacerbates the situation that led to the allegation of retaliation. The current process serves no one, least of all the public interest. It alienates all the parties, stands in the way of resolution, causes substantial damage to the reputation of a wrongfully accused innocent manager and permits a guilty manager to continue to manage, unchecked by the current process. The current process is fundamentally flawed for a number of reasons unnecessary to detail here. (See, December 28, 2000 letter to Bill Borchardt, Director, Office of Enforcement, with comments of Billie P. Garde regarding the NRC policy and practice in responding to allegations of retaliation.) ADR, properly established, could be a valuable tool to provide an avenue for a more timely and fair resolution.

*Question 8: Would any need for confidentiality in the ADR process be perceived negatively by the public?*

**Answer:** The issue of confidentiality is somewhat of a “red herring” in the context of discrimination cases since there is already a provision that prohibits “secrecy” in settlement agreements and ensures public disclosure of most ADR results. However, there should be a provision in any ADR process that provides for public disclosure on those issues that the public would be able to monitor and participate in if the matter was the subject of normal enforcement actions.

*Question 9: For policy reasons, are there any enforcement areas where it shouldn't be used, e.g., wrongdoing, precedent-setting areas?*

**Answer:** In the context of HIRD cases and SCWE issues it is likely that there will be cases in which the actions complained of are so egregious, the impact on the work environment so significant, or the intentional act complained of so inherently retaliatory that ADR is not appropriate. I have not attempted to outline what the criteria for those situations might be, but it is my experience that the vast majority of HIRD cases never result in enforcement and none have resulted in prosecution, so to build a process to the exception doesn't make sense. It makes far more sense to attempt to resolve

cases in a manner that accomplishes more than can be achieved through normal enforcement actions in a more timely, efficient and effective manner than presently available.

*Question 10: What factors should be considered in instituting an ADR process for the enforcement area?*

Answer: In the context of 10 CFR 50.7 allegations, the factors that should be considered in instituting an ADR process should be 1) whether the parties to the process are willing to resolve all issues, including issues impacting the Safety Conscious Work Environment of a work site; 2) whether the parties are willing to achieve full, fair and final resolution of the issues; 3) whether the parties are willing to disclose the result of the ADR process to the NRC in a public forum; 4) whether the parties are willing to permit future review of compliance with an ADR agreement as part of the NRC review of SCWE issues; and 5) whether all the parties, including the NRC, are willing to suspend other remedies, and agree to a stay of any applicable statute of limitations or protective filings to comply with any applicable statute of limitations, as a condition precedent to initiating ADR, with the recognition that no rights or responsibilities are abandoned in the process.

*Question 11: What should serve as the source of neutrals for use in the ADR process for enforcement?*

Answer: In the discrimination context, neutrals should come from the professional community of mediators, arbitrators, or judges as well as being familiar with the issues unique to the nuclear industry; for example, former DOL or civil trial judges experienced in the role of 10 CFR 50.5 and 10 CFR 50.7.

# ADMINISTRATIVE LAW REVIEW

Volume 51, Number 2



Spring 1999

Washington College of Law  
American University

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# SYMPOSIUM WHISTLEBLOWER PROTECTION

## FULL AND FAIR RESOLUTION OF WHISTLEBLOWER ISSUES: THE HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, A PILOT ADR APPROACH

JONATHAN BROCK\*

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\* Associate Professor, Graduate School of Public Affairs, University of Washington; A.B., Franklin & Marshall College, 1971; M.B.A., Harvard University, 1973. Professor Brock was appointed the first chairperson of the Hanford Joint Council, and served previously on the team that produced the 1992 study of how whistleblower issues were handled at the Hanford site. His teaching and research responsibilities are in personnel, conflict resolution, labor-management relations, and organizational performance and improvement.

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# I. FINDING THE NECESSARY TOOLS

The patchwork of laws, regulations and programs available for whistleblower issues are seldom pathways to resolution. The outcomes, particularly in the more complex or polarized cases, reflect mutual defensiveness and conflict more than dialogue or denouement. While recent laws and regulations have strengthened the right to raise issues, and earlier statutes established the grounds for a lawsuit, they have not provided a set of tools necessary to resolve the basic issues that arise when someone decides to blow the whistle or raise allegations of retaliation. At the Hanford Nuclear Site in Washington State, a new system, based on alternative dispute resolution (ADR) principles, has been developed for contractor employees that can address, in a non-conflicting fashion, the entire spectrum of issues in and around whistleblower disputes.

## A. Some Historical Highlights

The Federal nuclear complex of facilities for weapons production, storage sites and labs across the country has been a notable source of whistleblower cases, especially since the early 1980s when the focus at many sites

shifted to environmental clean-up. After leaving office, former Department of Energy (DOE) Secretary Hazel R. O'Leary observed how her first encounter with whistleblowers made "such a profound impression . . ."<sup>1</sup> Secretary O'Leary described discussions with whistleblowers, their families, security guards and others, at different DOE locations. These people described what she viewed as a highly unfortunate and unaddressed set of conflicts and misdirected resources. Hanford, in southeastern Washington State, during the late 1980s and 1990s was arguably one of the more active sources of whistleblowers in the complex. Aspects of the history and culture at Hanford seem to have made it especially fertile ground.

The typical nuclear whistleblower case, as it winds through the administrative process and the courts, often takes years to adjudicate. By that time the trail is cold on the safety issue and one career or several are already ended or in tatters. Thousands of hours of employee and management time have been spent in fruitless attempts at resolution, trying to understand, or, more commonly, proving the other side to be absolutely and completely wrong. Secretary O'Leary noted in her deposition that, "[t]here was already in the Department a structure which even the people who were running it admitted simply did not have either the muscle, the manpower, or[,] they believed[,] the perceived commitment to get things done."<sup>2</sup> Describing the beginnings of her efforts, she said, "we needed a system in place to both review the allegations raised, past and present, and try and find a way to avoid the hostile relationships existing between the so-called whistleblowers and the people within the DOE."<sup>3</sup>

Existing processes had left dozens of cases unresolved, regardless of the merits. A 1995 study by the National Academy of Public Administration, undertaken at the request of the DOE, estimated that there were over a hundred such unresolved cases by 1992.<sup>4</sup> Many of those cases were more than ten years old.

A substantial factor in everyone's frustration has been the costs to the government. According to records obtained through public disclosure reported by the Hanford Joint Council for Resolving Employee Concerns (the Council) in its 1997 Report, a sample of cases resolved through litigation or settlement in the late 1980s and early 1990s cost taxpayers an average of \$500,000 in contractor legal fees and \$60,000 to \$600,000 in settlements or

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1. Pretrial Deposition of Hazel R. O'Leary at 15, *Carson v. Department of Energy* (D.D.C. 1998) (No. 98-CV-00368).

2. *Id.* at 39.

3. *Id.* at 14.

4. See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, DEPARTMENT OF ENERGY RETALIATION COMPLAINT STUDY, PHASE I 14 (1995).

awards.<sup>5</sup> In addition, there is a diversion of management and staff time away from program priorities preparing for and defending the cases. O'Leary recalled, "if we had spent that money to resolve the claim, we might have better spirit in the Department," and gain some improvement in "safety and health statistics . . ." as well.<sup>6</sup>

### *B. Reforms in Available Tools*

Following the tumultuous period of the late 1980s and early 1990s, a number of administrative reforms were wrought in the Energy Department and in some of the contractor programs; the most pervasive beginning with Secretary O'Leary and some pre-dating her. These reforms contributed to an environment more open to employees bringing forth issues and better internal programs for resolving problems, but there remained substantial obstacles to preventing and resolving the more sensitive and complex cases. In noting the depth of these obstacles, even as Secretary O'Leary took office, a 1992 University of Washington study concerning Hanford (1992 university study) noted that "even excellent, regulatory and management practices would not be adequate . . ." to resolve these more difficult cases.<sup>7</sup> These cases, which reflect massive misunderstandings and breakdowns in communication and workplace relationships, require a different approach, with a more diverse and flexible array of tools and resources, differently applied than in normal channels.<sup>8</sup>

Yet, the 1992 university study found agreement, even among knowledgeable managers at Hanford, that the "core technical or substantive issues brought forward by whistleblowers have been valid and with merit."<sup>9</sup> The study examined some tenets of conventional wisdom about whistleblowers at the site and found the following.

### *C. Conventional Wisdom Blocked Real Dialogue and Problem Solving*

Contrary to conventional wisdom, the study concluded that few, if any, of the employees in the well-known Hanford cases had poor performance reports in their files until after the incidents, and that money paid in settle-

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5. REPORT OF THE HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS 6 (Apr. 1997) (covering period from 1994 through 1996).

6. See Pretrial Deposition at 56, *Carson* (No. 98-CV-00368).

7. UNIVERSITY OF WASHINGTON, INSTITUTE FOR PUBLIC POLICY AND MANAGEMENT, EXTERNAL THIRD PARTY REVIEW OF SIGNIFICANT EMPLOYEE CONCERNS: THE JOINT COOPERATIVE COUNCIL FOR HANFORD DISPUTES 2 (1992) [1992 UNIVERSITY OF WASHINGTON study].

8. *Id.*

9. *Id.* at 33.

ments had rarely benefited in any substantial way those who had brought suit, particularly after paying legal bills. In fact, many had lost their jobs or even their careers. On the other side of the conventional wisdom, no pattern of sanctioned high level harassment or retaliation was found during the early 1990s, although rogue harassment, sometimes of a serious nature, was identified.<sup>10</sup> O'Leary echoed this view of harassment in her deposition stating: "I cannot say that this had been a plan."<sup>11</sup> In other words, it was not officially sanctioned, but it could be found across the Department's nuclear functions and in various forms — often isolation by peers, disbelief of the person if they brought forth further issues or employment discrimination, and by the revocation of security clearances as one of the more pernicious forms. This had the affect of severely limiting or eliminating employment prospects for those whose professions depended on clearance.<sup>12</sup>

The University of Washington study examined the record of negative personnel actions in the visible Hanford cases in the late 1980s and early 1990s and concluded that contrary to another common piece of conventional wisdom, "there is no evidence to suggest that employee concerns have been raised primarily to cover up adverse performance appraisals or personnel problems."<sup>13</sup>

Despite the after-the-fact acknowledged validity of the core concerns in these Hanford cases, the actions and reactions triggered by standard company and government systems ended up polarizing these disputes rather than solving them, and led to a set of myths about each side that interfered with seeing each case on the merits. Thus, lengthy lawsuits, negative newspaper coverage, congressional or state legislative hearings and other embarrassing exposure followed. These, in turn, seemed to undermine confidence in the government and contractor organizations responsible for site safety or environmental clean up, and at a substantial dollar cost. Normally, not only was the career of the employee ruined, managers' reputations were harmed and more than one senior executive dismissed or transferred. The family toll on many was reported to be substantial.<sup>14</sup>

#### *D. Safety Issues Not Addressed*

Perhaps most ironic in terms of our public policy is that rarely, if ever, was the safety issue that gave rise to the complaint resolved as part of any

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10. *Id.* at 24.

11. Pretrial Deposition at 23, *Carson* (No. 98-CV-00368).

12. 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 16-18, 20-25.

13. *Id.* at 33-34.

14. See generally MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* (1989) (recounting dramatic stories from government and industrial settings).

settlement at Hanford during this period. Most settlements and the judgments available through the U.S. Department of Labor under the Energy Reorganization Act<sup>15</sup> and tort claims in Washington state courts,<sup>16</sup> as well as the Department of Energy's Regulations for Protecting Whistleblowers,<sup>17</sup> can only address the retaliation and personnel dimensions of a whistleblower case. The formal processes, more recently available under the DOE's Office of Contractor Employee Protection, have had some success with safety questions as well as the personnel dimensions, as have the employee concerns programs established at the site both in DOE and in the contractor companies. However, the highly polarized cases that periodically arise are resistant to resolution even by these systems.

## II. A SUCCESSFUL PILOT PROGRAM

This Article reports on a mechanism developed voluntarily at the Hanford site which has had an unblemished, but recent, track record in resolving these more complex concerns. Since the system only addresses contractor employees, this discussion is appropriately restricted to that arena. The new system, put in place in late 1994 and early 1995 after years of debate and preparation, arose through a series of steps apparently initiated by the site contractor at the time, the Westinghouse Hanford Company, frustrated itself with the results of their experience up to that point. After publication of a study by the University of Washington's Institute for Public Management and Policy,<sup>18</sup> they were joined in substantive discussions by nuclear safety interest and advocacy groups, represented by two which were active on whistleblower issues, the Government Accountability Project and Heart of America Northwest; by the Richland Operations Office of the Department of Energy; and by the Washington State Department of Ecology. When the final mutual endorsement of the idea was brought forward in early 1994 as a result of agreement by this collection of interests, it benefited from the encouragement and blessing of Secretary O'Leary and then the support of her successors, as well as the direct and continuing support of John Wagoner, the DOE site manager at Hanford.

O'Leary publicly praised the Council at several junctures, but perhaps the most telling is what she said after leaving office: "I am especially proud of the work that has been done at Hanford where much thought and care had been given to establishing a regime that . . . stepped us outside of

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15. 42 U.S.C. § 5851 (1994 & Supp. II 1996).

16. See *Cagele v. Burns & Roe, Inc.*, 726 P.2d 434, 435 (Wash. 1986) (establishing public policy exception to employment-at-will doctrine).

17. 10 C.F.R. §§ 708.1-708.15 (1998).

18. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7.

the box where there is a plaintiff and there's a defendant and someone's bad and someone's good."<sup>19</sup>

*A. A Record of Cost-Effective, Time-Effective, and Full Resolution*

The Hanford Joint Council for Resolving Employee Concerns employs a structured yet flexible form of alternative dispute resolution. In its two full years of case operations it has handled over fifty contacts, about half of them cases that had the earmarks of, or already were, litigious or highly publicized and polarized. Notable is that the Council also rejects cases that, after examination, do not represent whistleblower type of activity, or which the Council believes can be better resolved in a different forum.

The average cost of a Council case resolution is about \$33,000, about one-sixteenth of the direct legal costs of the cases that gave rise to its creation, even if the other direct and indirect costs and settlement costs are excluded. An entire year of the Council's under-\$400,000 budget that, in a normal year, handles ten to twelve substantial cases (as well as others that are handled informally or precluded from escalation) is less than the cost of one case of the sort that led to the Council's creation. The average time to resolve a full case under the Council system is four to six months, in contrast to several years under almost any of the alternatives, and many of those that began outside the Council system are ongoing five or ten years later. Unlike litigation alternatives, the Council explicitly resolves the safety concerns as well as the interpersonal and work-place issues, and with increasing frequency returns the employee to productive work with full closure of the conflict.

As a direct result of Council recommendations, changes have been made in safety practices, storage and handling policies, work practices, and chains of communication, among other variables, sometimes even before the case is fully resolved. Unlike adversarial proceedings, without the need for either party to posture or prepare for a defense of reputation or practice, there is open exchange about the issues and how they can be solved, and there is a mandate for resolving safety issues.

In contrast to litigation, the Council's ADR system involves only a few hours of managers' time, and requires very little time of top management, corporate, or government attorneys. The employee ordinarily remains on the job, working productively, and usually, at the end of the case, a return or reintegration-to-the-workplace is part of the resolution. The Council system has the unique feature of being able to provide protection to employees while their case is before the Council and even after the case is resolved.

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19. Pretrial Deposition at 41, *Carson* (No. 98-CV-00368).

Since the Council's inception, no case within the Council's jurisdiction at the time of the incident or complaint has gone to litigation or been in the press or the political process. By the same token, the Council has also handled cases already filed or in the press, although they are more complicated and sometimes more costly to resolve.<sup>20</sup> The record represents such vast improvements in problem solving, fairness to all parties, and time and cost efficiencies that it merits review and consideration for why it works. In addition, the Council has moved from exclusively reacting as cases come up to doing preventive work.

*B. A Charter of Authority to Define an Unusual ADR Mechanism*

The special ADR system is carried out by a blend of eight regular Council member seats, drawn in specified combination from the corporate, interest group, and from neutral members of the community, all operating within a specific and agreed upon charter of authority to "seek full and fair resolution of significant employee concerns involving health, safety, quality, or environmental protection using an alternative mediation approach."<sup>21</sup>

In the charter "[s]ignificant employee concerns" are defined as "those which raise complex or controversial technical issues in the substantive areas defined . . . ; inappropriate management response to such technical issues (i.e. alleged harassment or retaliation); involve potential for injury to workers; and/or have potential onsite or offsite impacts (i.e., those which could exceed applicable radiological or chemical exposure or contamination limits)."<sup>22</sup> Excluded are several areas including personnel management issues that do not arise from the significant technical concern, classified matters, allegations of criminal misconduct, matters accepted for investigation by the Inspector General, matters in litigation except with the concurrence of the parties, or matters which do not involve the companies' activities as employers or DOE contractors.<sup>23</sup>

These specifications not only ensure the opportunity to intervene in significant concerns, but also ensure the DOE and the contractor that the Council does not have a "hunting license" for any site issue. The agreed-upon charter has no force of law, but has served as the successful guide and as a sort of "constitution" to the process. It has been "amended" only twice since the initial agreement.

20. Recently, the Council handled a highly publicized situation that involved ten employees near a significant chemical explosion, but which was not begun as a result of a safety or harassment situation.

21. HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., CHARTER § 1.1 (July 1997) [hereinafter CHARTER].

22. *Id.* § 1.3.

23. *Id.* § 1.4.

The Council achieves its results by using the charter authorities with a carefully considered membership mix on an eight-member Council. This is composed of a neutral chair, two members from public interest community groups, two seats from the main Hanford contractors, a former whistleblower, and two neutral leaders from the business, academic or labor communities. Recently, the Council has added a number of "case-specific" members who are activated when cases arise involving their subcontractor company.<sup>24</sup> Unlike investigations, administrative procedures, or even mediation, this unusual blend produces an effective body for case resolution with a combination of knowledge, perspectives and influence that covers the full range of needs for assessing and resolving whistleblower cases. This blend allows the Council to apply tools and persons appropriate to the resolution of each situation, from an entirely fresh perspective, unbound or restricted to specified steps or tools, as is common in much of the administrative law and internal procedure available. The only restriction is that actions and recommendations must be by consensus and within the charter. Consensus by this membership mix virtually insulates the process from challenge by any of the usual adversaries.

### III. ORIGINS

#### *A. Mutual Frustrations Give Rise to a New Approach*

As with many conflict resolution mechanisms or mediated solutions, the Hanford Joint Council arose after years of conflict. In the end, the primary adversaries<sup>25</sup> and the primary public interest groups<sup>26</sup> confronting Westinghouse and DOE agreed on the system. So great was the historical mistrust, it took a year to complete a study that could lay the groundwork for change, another to yield a charter, and yet another to appoint members, set up the independent corporation, develop procedures, and take the first case.

At the table, in addition to company and interest groups, were representatives of the DOE Richland Operations Office, which would have to authorize the Council's activities, and the State Department of Ecology, which had become increasingly concerned over the continued volume of whistleblower cases and the implications for safety and confidence in the site operation. Even the state's Governor had been awakened in the night by phone calls about whistleblowers.

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24. *Id.* § 4.2.

25. The Westinghouse Hanford Company was the main DOE contractor at Hanford at the time.

26. The primary public interest groups were the Government Accountability Project and the Heart of America Northwest.

All of this was against a backdrop of conflict that had come to a crescendo in the early 1990s.<sup>27</sup> Westinghouse had been the recipient of a substantial amount of negative local and regional press, as well as pressure from the DOE and state regulatory officials. The predominant response by Westinghouse had been an aggressive litigation and public relations defense.

Interviews with key senior managers made it clear that most of the whistleblower cases that had become controversial represented systems breakdowns of communication or problem-solving mechanisms within the company. The 1992 university study reported that no unified or authoritative mechanism was available for dealing simultaneously with the full dispute.<sup>28</sup> It was common for the technical and interpersonal components to be handled separately and for sequential, but unconnected, reviews of one component or another to take place in different parts of the company.<sup>29</sup>

Top management of the Westinghouse Hanford Company, then under the leadership of Thomas Anderson, was already looking for a way to move the focus from litigation, and the related imperative to win and avoid liability, to an external third party review process which would allow the company to resolve the problem — win, lose or draw — and move on to the main tasks at hand. It was later learned that the interest groups were experiencing similar frustrations with the status quo. There is some evidence to suggest that the head of the public relations office, often pilloried by the interest groups for expenditures on corporate image polishing, was among those leading the charge for a new approach. As the study team discovered, the mutual frustration, encompassing also the government agencies, was such that there would be sufficient motivation and confluence of interests to focus attention on a promising new approach, if one could be developed.<sup>30</sup> Up to that time, the level of agreement on frustration with the status quo overshadowed, but did not yet override, the mutual suspicions and the ongoing legal and public relations battles.

#### *B. A Cautious Development Process Involves Key Parties*

In 1991 Westinghouse approached the well-respected director of University of Washington's Institute for Public Policy and Management, Betty Jane Narver. Ms. Narver and the university team she assembled worked

27. Numerous law suits had been filed by the Government Accountability Project, private attorneys and others on behalf of aggrieved employees.

28. 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 7-9.

29. *Id.*

30. See JONATHAN BROCK, *BARGAINING BEYOND IMPASSE* 218 (1982) (discussing ingredients of a successful dispute resolution mechanism).

from research on alternative dispute resolution systems, which suggested that a case review mechanism would only be successful if it had legitimacy in the eyes of the broad range of interested parties. This was confirmed when an over-anxious press relations person from the University or Westinghouse scheduled a press conference to announce the study. An interest group representative denounced the nascent study on the spot. Clearly, the neutrality of the University would not be sufficient on its own. The process of developing any new concept or mechanism would be as important as the design of the mechanism itself. In particular, the team was sensitive to unsuccessful mechanisms in other settings — drafted by scholars or legislative staff — which were not designed and agreed to by those who would use it or those with an important interest in the process or outcome.<sup>31</sup> The university team, recognizing the importance of a fully independent study and avoiding oversight by one of the parties at interest in the conflict, arranged that the work be done for the Washington State Department of Ecology, rather than Westinghouse or DOE. Interest group and company representatives later noted the importance of the substance and symbolism of that arrangement, and a senior Ecology official, Max Power, and also the then-director of the Ecology Department, Christine Gregoire, assisted in gaining invaluable access, information, and insight for the study.

Recognizing the particularly polarized climate at Hanford, the effort was divided by the study team into three sequential stages so that sufficient trust and involvement of the necessary parties might be built. Stage I was the feasibility study. The study team intended the development of the report and the report itself to be a consensus building exercise that could set the stage for a new approach. Thus, proceeding with caution, for the importance of taking sufficient time and effort to build a consensus on a system,<sup>32</sup> a study that spanned a year began with interviews of 120 persons on site, elsewhere in the state, on Capitol Hill and at DOE headquarters, including whistleblowers, managers, senior executives, other employees, Federal, state and local government officials, interest group representatives, and others. At the end of Stage I, all relevant direct and indirect parties were cautiously enthusiastic about the Council concept<sup>33</sup> and agreed with the main principles in the 1992 university study.<sup>34</sup>

31. See Jonathan Brock, *Mandated Mediation, A Contradiction in Terms?* 1991 VILL. ENVTL. L.J. 57; Jonathan Brock & Gerald W. Cormick, *Can Negotiation be Institutionalized or Mandated? Lessons from Public Policy and Regulatory Conflicts in* MEDIATION RESEARCH, 138, 162, 164 (Kenneth Kressel et. al. eds, 1989).

32. See Brock & Cormick, *supra* note 31, at 162.

33. One supportive corporate officer declared: "Why didn't we think of that?" The response from interest group leaders was equally encouraging.

34. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7.

As a testament to the controversy whistleblower cases had generated, more than fifteen news outlets covered the release of the report to the Department of Ecology. A half dozen favorable editorials appeared, urging all parties to embrace the Council. The *Seattle Times* editorialized that "[e]mployee health and safety, and public confidence . . . could be advanced by a novel plan to give workers a forum to air the occupational and environmental concerns," and went on to note, "[w]hat is surprising and encouraging is the universal enthusiasm for the panel, and stated intentions to make it work."<sup>35</sup>

The report defined the overall concept for whistleblower dispute resolution and laid out a series of basic requirements: balanced membership; independence; operating authority delegated from the president of the main contractor; a multi-year commitment by the Department of Energy (DOE) and related budget independence; appointment procedures that would insulate appointments from political or economic influence, yet keep key Hanford players involved; and that the mechanism become a condition of the contractor's contract with the DOE for management of the site. This was still only a concept, and developing it into a practical and acceptable mechanism was the work of the next stage.

Stage II would be a focused exploration by those subsequently identified as key direct and indirect parties of the design and issues in establishing a system that would work and have their (companies, interest groups, government, others) mutual confidence. This stage became the negotiation over the charter, which defined the structure and authorities of the mechanism. A nationally known mediator, Gerald Cormick, consulted with the top leadership in each camp and then selected a working group with representatives from Westinghouse, environmental and nuclear safety interest groups, the Richland Operations office of the DOE, and the Washington State Department of Ecology.

Following ten joint meetings, and using a principled negotiation process,<sup>36</sup> the working group developed a charter for the Council. With the needed authorities defined, a formal request was made by Westinghouse, with the full concurrence of the working group of the DOE's Richland Operations office, to authorize the Council's establishment and operations. This authorization came from John Wagoner, the DOE's manager at Hanford in January of 1994.

Stage III, if it got that far, was to be the actual development of operating policies and selection of members that would run the mechanism, and

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35. *Provide a safehaven for wary whistleblowers*, SEATTLE TIMES, June 29, 1992, at A8.

36. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES*, chs. 1-5 (2d ed. 1991) (describing principled negotiations).

would segue into resolution of cases. Earlier research suggests that some continuity between those who formed and those who later operated a system was a potentially important ingredient to success,<sup>37</sup> and a successful attempt was made to involve some likely future members in Stage II and III planning. Some months after the charter was agreed to and authorizations received, the chair was appointed and began implementation work with the group Cormick had assembled, thus opening Stage III. Council members, including some from the work group, were appointed some six months later, in October of 1994.<sup>38</sup>

The staging lowered the risks to the erstwhile antagonists. The first stage required only the risk of being interviewed. Everyone could still shoot at or ignore the forthcoming report. The second stage required candid discussion, but now around a concept that had been embraced. No actual commitments were necessary until the end of Stage II, when parties would have to say "yes" or "no" to the charter and its features — a charter that they would be at the table to develop. Thus, the Joint Council process that later emerged was itself a site-specific agreement among the necessary direct and indirect parties, giving the system realism and credibility relative to the problems and audience it would subsequently address.<sup>39</sup> Any attempt to replicate the system elsewhere would require a similar local agreement, with an appropriately convened group of principals from among the key adversaries.<sup>40</sup>

#### IV. CASE HANDLING AND APPLICATION OF THE TOOLS NEEDED FOR FULL AND FAIR RESOLUTION

The 1992 study identified common patterns in handling whistleblower cases that accounted in substantial measure for the difficulty in resolution at Hanford. These factors are described in Table 1.<sup>41</sup>

*Table 1. Common Patterns in Complaint Handling*

- First line supervisor insufficiently prepared or responsive:
  - Misunderstood technical complaint
  - May have felt threatened or under opposing pressures
  - Did not possess necessary resources, authority or skills

37. See Brock & Cormick, *supra* note 31, at 162.

38. The Council members who came from the Stage II work group included: Thomas Carpenter of the Government Accountability Project; Gerald Pollett, Heart of America Northwest; Richard G. Slocum, Westinghouse Hanford Company. Ronald Lerch, Westinghouse Hanford Company, joined the Stage III work group and was also among those initially appointed to the Council.

39. See Brock, *supra* note 31, at 83.

40. See *id.*; see also Brock & Cormick, *supra* note 31, at 162-64.

41. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 38, tbl. 9.

- Escalating polarization between supervisor and complainant
- Peer or "rogue" harassment occurred
- Insufficient protections to prevent actual or perceived harassment
- Insufficient *authority* and *resources* applied in timely fashion
- Insufficient attention to perceptions of method (or approach) used to handle the complaint
- Approaches often didn't address underlying problem
- *Ad hoc* handling, insufficient continuity and case management
- Insufficient information flow to employee during and after reporting complaint
- Resulting and remaining tensions to workplace largely unaddressed
- Undue emphasis on both sides on proving right and wrong, defending actions
- Insufficient emphasis on problem solving
- General lack of closure
- Greater chance of resolution when problem reaches higher levels

The Council process was set up to deal with these barriers that seemed to be typical of the whistleblower cases of the 1980s and early 1990s at Hanford. The study also identified the features of a mechanism that could overcome these barriers, which were acknowledged as relevant by the key parties interviewed, and the Stage II discussions focused on building a system that took these into account. Table 2 of the report lists sixteen such features.

Table 2. *Necessary Features of a Successful Third Party Review Process*<sup>42</sup>

- Provide neutral forum for problem solving
- Possess authority to protect and intervene
- Identify problems and intervene constructively *before* escalation
- Flexibly apply tools to address both sets of problems:
  - technical
  - interpersonal/personnel
- Immediately apply proper authority and resources
- Have continuity and accountability for case management
- Provide feedback to employee during process; possible involvement
- Be fast, non-bureaucratic, non-defensive and without red tape
- Have mandate for action and problem solving; not demonstrating right or wrong
- Employ objective and effective final closure mechanism

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42. See *id.* at 3-4, tbl. 1.

- Retain and encourage management accountability and chain of command
- Preserve and respect all existing rights and regulatory requirements
- Intervene selectively, do not be overwhelmed by cases
- Possess sufficient capacity to ensure attention to major concerns
- Make more effective use of existing systems
- Encourage atmosphere where concerns can be brought forward and resolved

#### V. A TYPICAL CASE

The Council system contains features described below.

##### *A. Get the Case Early*

As part of getting cases early before they become unduly polarized, cases most often come to the Council through the interest group members, who refer cases that have come to their attention through their informal networks and advocacy reputation on site. The opportunity to use this informal network is an example of how the membership structure contributes new tools. Typically, the employee comes to the Council after successive attempts to go through the chain of command or established safety reporting channels. Believing that the issue was not heard or believed, and usually with a conflict well underway at the workplace, the employee is looking for a means to go outside the company to a lawyer, press, or elected officials to get the issue addressed. He or she is also usually frustrated with the Department of Energy. In all cases the Council has thus far formally accepted, at the core of the interpersonal and workplace strains is a safety issue that merited attention, most of which could have been resolved in a direct fashion had the necessary level of authority, judgment, and resources been more immediately applied.

##### *B. Preserve Rights of Parties So They Will Risk Mediation*

Various sets of established legal rights had become the only touchstones for whistleblowers and, indeed, for the companies. When working with the Council, no one gives up any rights they have under law. The security this feature provides is believed to be a strong attraction to employees. An employee and the company, however, are asked to put on hold any pending concerns processes, litigation, or complaints. Courts and other agencies have been cooperative in making the necessary arrangements to "stop the clock." Either party can reinstate the other proceedings, although no one has yet done so. Also, the retention of all other reporting requirements means that neither the employees, the public interest community nor man-

agers participate in a process that in any way interferes with nuclear safety regulatory and reporting obligations.

Keeping with the company's contractual obligations and rights to run the business operations, the Council's charter and practices identify the value of keeping accountability where it belongs for site safety and clean up and to maximize learning.

Recognizing the importance of a stable collective bargaining relationship and the rights of the parties, the Council, by charter, explicitly will not recommend resolutions or commence involvement that could interfere with established collective bargaining rights. Nonetheless, the Council has been successful in resolving concerns brought forth by bargaining unit employees without intrusion into collective bargaining relationships.

There are, of course, cases where the Council does not believe it has jurisdiction or can be helpful in resolution. These decisions also are on a consensus basis, and the employee is informed promptly so that he or she can decide whether or not to exercise other rights.

#### *C. Case Management, Continuity and Handling All Dimensions of a Case*

To begin the process, the staff, and then the chair, performs a preliminary intake interview sometimes accompanied by an interest group member, makes a basic determination of jurisdiction, and explains the process. With the employee's assent, the case is "triaged" by the full Council to determine the nature and status of any issues; urgency; any other, more appropriate channels for resolution; and whether or not there is jurisdiction and a likely Council ability to resolve the matter.

If the members believe there is a reasonable opportunity to expeditiously solve the situation through chain of command or other internal channels, and the employee agrees, the employee is "sponsored" back in to the process (usually to a concerns program) or to a manager, who can best help. The Council will then monitor the situation, able to re-engage. These referrals have been entirely successful, however. At the triage session, the Council will also consider possible conflicts of interest and exercise recusal as required.

#### *D. Protection to Prevent Escalation*

The Council also identifies any needs for immediate protection actions to forestall escalation of the conflict. Escalation of a whistleblower dispute is among the most damaging aspects of the cycle, putting the issues increasingly out of reach as emotions increase and positions harden. Protection minimizes the chances for escalation that might produce further retaliation actions or allegations, or the other workplace or interpersonal

strains that usually emerge. Protection is also important since anonymity is not practical once case assessment activity begins in a closed culture like a nuclear plant.

As a result, the Council charter provides the unusual authority to protect employees and managers.<sup>43</sup> The standard adopted in the policy and operations is to keep relationships and interactions as normal as possible during the period the case is being resolved, and to avoid additional misunderstandings and suspicion, while not interfering with business operations or normal performance expectations.<sup>44</sup> Usually, the most important protection activities happen in the early days of the case, where the workplace relationship has deteriorated to a flash point. Sometimes immediate actions or responses are taken to defuse potentially provocative events.

Actions may include seeking a voluntary temporary transfer or other means to separate antagonists, forestalling a moved office, or holding in abeyance performance evaluations and other personnel actions that could be sensitive or controversial. Such alterations in the workplace requires consensus and active work by the Council members from all seats. Late night and weekend calls are typical. After a week or so, the escalation is usually arrested and jockeying and accusations subside as everyone sees a productive channel in play. While the Council has the case it is expected that unnecessary or potentially provocative employment actions will be held in abeyance and other actions reviewed in an appropriately sensitized context.

The largest resistance to protective actions are from staff and managers who have been involved in the case earlier and who feel that any delay or modification in the circumstances somehow grants special privileges or interferes with building a case for hearing. The Council is careful to inform the parties that all normal expectations apply. Just as the employee is not barred from exercising rights, the employer does not yield the right to take actions necessary to run the business. This voluntary protection does not stem from regulation, thereby allowing sensitive actions to be handled in the context of the circumstances.

#### *E. The Use of Joint Subcommittees to Assess and Manage a Case*

After accepting a case, the Council chairperson forms a subcommittee comprised of a person from each of the seats: company, whistleblower or advocacy, and neutral. With no previous history in the case, this group will take a fresh look. The president of the affected company is notified by let-

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43. See CHARTER, *supra* note 21, § 1.1.

44. See HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., POLICY & OPERATIONS GUIDELINES 12-14 (1997).

ter suggesting that line supervisors and managers be informed that the Council has taken the case and that they can get assistance from company members. Almost immediately, then, the case comes to a neutral ground, where it will get a fresh look from the necessary level of authority in the company and in view of the senior leaders in the interest group community.

The multi-seat subcommittee convenes within a couple of weeks, meeting with the employee for a half day session. This meeting often ends with the employee observing, "this is the first time anyone in authority has heard my full story," or "this is the first time I really felt heard," reflecting the difficulty in using normal channels in these complex cases, and the depth of misunderstanding.

The subcommittee then determines what other information it needs, including who should be interviewed. Some allegations do not bear out and are simply part of the tension and suspicion in the situation; others require attention. Thus, it is critical to do a balanced assessment so that the real and most critical problems are addressed. Working to be non-bureaucratic, to avoid red tape, and to overcome scheduling challenges, the subcommittee merges schedules and the assessment process is usually completed in a few days of activity over the course of a month.

Overcoming another of the common problems in prior case handling, a member of the subcommittee is assigned to keep in touch with the individual. The full-time local Council staff maintains contact with the employee as well. This staff channel has proven to be a critical vehicle for ensuring that information is available to the employee so that suspicions or related uncertainties do not develop unnecessarily, as was often true in the cases that predated the Council. In these and other ways, the subcommittee and the staff become the main vehicle for case management and ensuring continuity and progress.

Usually the company representative arranges the interviews and the employee's release time. As the interest group member helped the employee in the initial interview, the company representative helps supervisors, managers and other employees become comfortable in the interview setting. The interviews are informal, confidential, and not on the record or under oath, leaving the sessions, usually, unobstructed by defensive concerns. In this setting, information critical to resolving a case has often been unearthed within hours. Council members who have been involved in litigation have marveled at the contrast between this situation and the dozens of hours of depositions, discovery and cross examinations it would take to get anywhere close to the same level of information, if at all.

Given the multi-seat composition, there is significant trust in the subcommittees' conclusions. Nevertheless, many useful ideas to improve or redirect the strategy emerge in full Council discussion. In forming a case

resolution strategy, where possible, the Council seeks the involvement and input of the employee and of key accountable managers on specific issues. The process is used to create heroes and helpers wherever possible in the normal chain of command and avoids creation of martyrs or victims.

#### *F. Restoring a Stable Employment Relationship*

Unusual for whistleblower case resolution is the capacity to restore the employee to productive work as part of a resolution. In litigation settlements, it is more common for the employee to leave the site, the workplace relationships being too strained and the mutual bitterness too great. Since the Council normally gets the case early, it can preclude much of the usual escalation; and because of the tools offered by the membership structure, it has been successful in developing a return-to-work plan in many cases, overseeing and smoothing the transition. Sometimes the employee returns to the same work site, though often to a different one, but always using the skills they have developed. One of the largest challenges, however, has been to fashion a restoration of career trajectory free of the conflicts that led to the case, but recognizing the inevitable sensitivities.

#### *G. Gaining Implementation*

Although the Council could simply make a recommendation to the company president, the preferred strategy is to involve those in the company who must implement the recommendation. This strategy promotes accountability and learning, can improve the atmosphere, and helps in the re-establishment of workplace relationships and trust. Normally, the Council gets helpful cooperation when such officials are approached by one of the Council's company representatives. Occasionally, the persons with the necessary authority and knowledge are in DOE, and when approached, they have provided assistance and information, even though the Department is not represented on the Council.

Once the final recommendations are ready, mutual agreements and commitments are usually detailed in a collective sit-down with the employee and relevant management personnel. The company president and the employee are separately briefed by the appropriate combination of Council members, a recommendation letter is sent to the president as the charter requires, and a similar letter goes to the employee. Although there are exceptions, by this time there are no surprises and rarely any significant naysayers in the company line. The employee is also prepared to accept the recommendation. If the recommendation is accepted, and all have been so far, the end of the dispute is memorialized in a "closure document." If

there is an extant claim, the parties normally sign a legal agreement settling the matter. Otherwise a simple letter or memo is used.

The consensus recommendation, as the charter describes, is to be "presumptively implemented,"<sup>45</sup> not negotiated further with either the employee or management. Negotiation at that point would defeat the credibility of the independent review, since the process is purposely designed to take a fresh look and keep the previous history from interfering. Sometimes there is resistance from managers or staff experts who earlier were part of the conflict or provided staff support to prepare for possible future litigation or administrative appeals. Partly for this reason, the Council is explicitly chartered to make the recommendation to the president, not to the line manager or other staff, although as described above, the responsible officials are constructively engaged whenever possible.

Most cases are resolved with the employee satisfied, with the tensions largely removed and with a restored career trajectory. Managers are glad to be out of the conflict and have the safety issue solved. The company presidents have been universally pleased to have the problem solved constructively.

#### VI. PREVENTIVE ACTIONS

The Council more recently has been able to play a useful role with preventive activities. Such a role has been aided by a charter revision<sup>46</sup> emerging from the 1996-1997 Council renewal discussions with Fluor Daniel Hanford Company, the contractor that followed Westinghouse. This charter revision invites the Council to bring up outside of a case context items that might benefit from management attention. Thus, in 1998, responding to the lack of sufficient preparation of first line supervisors to deal effectively with incipient whistleblower situations, many middle managers and other key staff, the Council, and Fluor Daniel Hanford co-sponsored a four-hour training session attended in shifts by more than six hundred managers, supervisors, and human resources staff. Video tapes and summaries were distributed to dozens of others. This effort at providing skills and perspective for constructive response to potential whistleblower situations was widely praised throughout the company and in the interest group community as providing new tools to better deal with safety questions. The training was performed by a Council member who was once in a dramatic whistleblower situation.

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45. See CHARTER, *supra* note 21, § 2.6.

46. See *id.* § 1.7 (stating that Council will periodically summarize and analyze trends and issues encountered in its work).

## VII. WHY DOES IT WORK?

The primary factors in the Council's success are: the membership composition and the tools it brings, including the capacity to immediately bring the right level of authority and perspective to the case; independence and neutrality; the fact that the system's existence, features, and its operating authority are the product of agreement by all relevant direct and indirect parties; the rule of working and recommending by consensus; the agreement to presumptively implement consensus decisions; the stable and rapid availability of a multi-tool mechanism; and mutual risk-taking to let the process work.

*A. Membership Composition is the Key Variable*

Because of the combinations of technical and interpersonal issues and the complex organizational structure and politics at the site, neither a group of disinterested technical experts, nor a stable of excellent mediators would be able to make sufficiently realistic or complete recommendations. Nor could such groups ensure implementation and acceptance. Therefore, neutrality in this system had to be a "knowledgeable neutrality," accompanied by influence in the company and in the whistleblower public interest community. Furthermore, the system would not have credibility or survive the prevailing controversial environment unless the key antagonists felt their core interests were protected. The route to a knowledgeable and accepted neutrality was found by combining member seats that would possess the required balance of expertise, authority and constituent credibility. It is this combination of member characteristics that yields the range of tools available.

Initially, it was thought that the Council could deputize a stable of mediators to work out the issues once the Council took jurisdiction of a case. Experience suggests, however, that most of the cases the Council accepts require a more hands-on involvement by the multifaceted neutral representation of the Council membership. Standard mediation can be used to settle employment or financial issues, as is common in other venues of workplace conflict, even in contentious circumstances. Mediating safety issues, however, seems less likely to succeed and raises a number of questions on its own. The return-to-work, protection and other features also seem to require more than simply agreement. Rather, the special sort of ADR made possible by the combination, and the active involvement of Council members makes it necessary to put into practice and to "sell" the recommendation to key constituencies whose agreement or assent is important to full resolution.

*B. Member Characteristics*

Recognizing the importance of gaining the appropriate balance, the characteristics for members were discussed at each stage of development and were ultimately summarized during Stage III in a paper called the "membership document."<sup>47</sup> This document was developed through joint discussions to more closely define expected roles, characteristics, and behavior.

Beginning with the interest groups, it became evident that those seats would require individuals highly credible to individual whistleblowers, to the whistleblower community, as well as to the environmental interest group community. The belief that the interest group members are not "selling out" safety issues or individual rights is critical to the credibility of the system. Their outside standing and current knowledge of the site helps them to be taken seriously by company officials and allows them to make decisions and commitments without undue checking back with others in the environmental community. Such checking back causes delays, compromises confidentiality and allows entry of interests unrelated to the issue on the table. These members must also be able to help whistleblowers who have become impatient to work in the mediation framework.

The interest group members must also be prepared to work across the table with company officials. At Hanford, the nature and history of the conflicts were such that the twenty-three member interest group coalition on site nominated, and the chair appointed, representatives who had the most background and credibility on whistleblower issues, i.e., from the Government Accountability Project's West Coast Office and from Heart of America Northwest. Parallel to the appointments process for the company seats, the chair appoints from among individuals nominated by the safety and environmental interest group coalition following consultation with key leaders.

The company members must similarly be highly credible within their organization since they will be asking managers and staff to rethink or reverse positions based on new insights the Council process may uncover, and will have to act without checking back, also to avoid delays, confidentiality breaches or extraneous considerations. They must have the ear and full confidence as well as instant access to the president of the company, and be capable of working with interest group leaders who, in other settings, may be publicly critical of the company.

The temptation by many observers is to assume that this is an industrial relations, legal, human resources, or complaint department function. How-

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47. See HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., HANFORD JOINT COUNCIL MEMBERSHIP RESPONSIBILITIES & CHARACTERISTICS 3-11 (1999).

ever, the substantial proportion of the company representation must come from those who have the authority to change operating decisions and practices and work out needed human resource responses. A senior human resources official has often, but not always, been part of the company team, and such a position brings important judgment, creativity, and influence in addressing the issues. Currently, the most senior contractor personnel officer is on the Council, along with two of the most senior operating managers and a series of "case-specific" members, mostly with operating authority in their respective areas. This has been a useful combination. By charter, the company presidents and chair consult on the appointment of company seats, and normally after discussion and review of the key requirements, several are nominated for consideration and then left to the chair to select.

For both interest group and company representatives, the nature of the issues require members who can exercise creativity and go beyond typical boundaries. They must have the clout and self-confidence to resist already-established positions on cases that have previously engaged lower level officials, staff offices, concerns programs, or other interest groups. Because of lingering opposition in a particular case or because of history of the site, substantial authority is sometimes required to put a resolution into place, to gain acceptance for it, and particularly to take the necessary actions in a timely way.

The Council charter at Hanford also provides a seat for a "respected former employee or other individual familiar with whistleblower experience, or with raising and resolving employee concerns."<sup>48</sup> This additional "advocacy" seat has proven invaluable to help bridge the cultural gulf that exists in the understanding of cases. The Council has been fortunate to have a former whistleblower, Billie Pirner Garde, unrelated to Hanford issues and who later became a plaintiffs' attorney, fill this seat.<sup>49</sup>

The remaining seats are for "two respected neutral leaders with management, technical or labor experience in industry or government, and who have experience in collaborative problem solving or alternative dispute resolution."<sup>50</sup> These individuals are trusted with tasks by both sides that could not be undertaken by a company or interest group seat, such as holding or reviewing sensitive information, as well as often providing ideas that help move away from an impasse and towards consensus. Christine Speith, formerly secretary-treasurer of a local union and respected on both sides of the table for her objective problem-solving skills, was initially appointed and remains on the Council contributing these traits to the process.

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48. See CHARTER, *supra* note 21, § 4.2.

49. See GLAZER & GLAZER, *supra* note 14, at 217 (narrating the story of Billie Pirner Garde and her whistleblower experiences).

50. See CHARTER, *supra* note 21, § 4.2.

These latter three seats — two “neutral” and one “respected former employee” — are filled at the discretion of the chair, after consultation with the parties on necessary characteristics, but not on individual names.

Distrust, the need for neutrality, and assurance that the parties would have influence in the appointment of the Council chair, led to a two-stage process for appointment. First, the key stakeholders identify and nominate a chair they find mutually acceptable. Second, the president of the main contractor appoints the chair. While he or she can reject a nominee, he or she can only appoint someone who has been nominated by the stakeholders, including those represented on the Council and those involved in the Council’s formation.

Ensuring that each members’ main calling is in their regular employment, only a modest honorarium for Council meetings and days on case work is provided for non-company seats, as well as reimbursement under government rules for travel and related expenses. Company members perform their duties without additional compensation and are expected to perform their regular jobs without interruption. The chair, by charter, is not to be a full-time position and receives part-time compensation. This “volunteer” nature of the membership is important in maintaining the positive tensions in the knowledgeable neutrality of the membership structure, the members’ relationship to their constituencies, and a priority on full and fair settlements, rather than on self-perpetuation.<sup>51</sup>

### *C. The Application of Sufficient Authority, Judgment and Resources*

When a case comes to the Council, it skips all of the remaining stops along the way to the usual impasse. In these more complex cases, the authority and technical expertise to resolve a safety issue does not reside in the first line, the concerns program, or the legal office, nor does the authority to take a second look at the personnel aspects.

The company members are at a level where they have a broad view of the situation and possible solutions, and can get the attention of any senior official and affect the allocation of technical and other resources. They can get action quickly, including the application of protection or in quickly implementing resolution steps. Safety issues can be resolved in real time, and some have been addressed within hours. The interest group members add to the perspective of the company members in understanding the nature of the situation and the probable legal and cultural course of the conflict, and provide leadership in dealing with the employee and also on some site-wide

51. See BROCK, *supra* note 31, at 233-34 (discussing the value of volunteer members in such resolution mechanisms). Membership criteria are detailed in the charter. See CHARTER, *supra* note 21, at §§ 3.0, 4.0.

policies. This level of combined insight overcomes the common pattern of attempting to handle these cases without sufficient tools or authority, a key problem in resolving complex whistleblower cases.

#### *D. Independence and Neutrality*

Neutrality is critical to the success of any ADR process. A system tied administratively or financially to any of the parties would fail for lack of credibility, if nothing else. Thus, the structure and administration of the Council strives for neutrality and independence. The membership structure is at the core of neutrality, as is the complex appointments process, which provides each side with confidence that neither side controls the process.

There are also administrative considerations. The Council is an independent non-profit organization, administered by the mutually nominated chair and the neutral staff. It is not an arm of the government or the contractor, but rather operates on a separate lease, separate budget and separate staff. Crucial is financial independence and the longevity of the system — here the DOE is critical. The Department has earmarked funds upward of \$500,000 annually (the Council has never spent that much, the most recent completed year saw expenditures of about \$390,000) for Council operations. The Department is the guarantor of the Council's existence, because its use is mandated in the main site management contract, and is set for an initial undisturbed period of five years, subject to renewal. DOE's willingness to budget the necessary amounts and allow reimbursement to the companies for settlements under the Council's jurisdiction is a key incentive, since contractors can be reimbursed for most litigation costs under current DOE policy. There must be an equivalent or better financial reason to engage in settlement.

The operating funds are controlled exclusively by the Council, administered by the chair and staff while no manner of pre-approval of expenditures by DOE or the companies is involved. Any party that could affect the flow of funds could also affect the Council's ability to intervene in cases and the timing or application of tools, thereby eviscerating the independence and neutrality. The independent authorities are formally documented to assure that actions can be taken without delay, yet are in compliance. The Council scrupulously follows federal procurement and related financial requirements in an effort to merit the independence necessary. A financial audit is carried out each year, and other operational audits occur periodically. The Council retains independent legal counsel from a respected regional firm. This degree of independence is essential to operations, confidentiality, and credibility. Implementing an independent structure within the DOE environment required careful arrangement of financial and administrative parameters.

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The Council strives to have its staff arrangements and day-to-day administration merit the confidence of members, their constituents, and those who deal with the Council. Important in this mechanism and in those cited in the research above is the existence of neutral, unaffiliated staff, with no history working on the site. Council offices are in rented space away from any of the common company or government facilities. The staff (usually approximately one-and-one-half full-time employees at any given time), is careful to respect the confidentiality and rights of parties by ensuring that they receive information to which they are entitled in a timely and considerate way. Information about a case is shared on a need-to-know basis only, and strict procedures befitting a mediation forum are followed. Any appropriate courtesies are extended in an effort to have the Council office be safe ground for candid and creative discussion.<sup>52</sup>

*E. The System is the Product of Agreement*

The careful and thorough discussions that led to the formation of the Council, including the charter agreement, represent an easily forgotten yet critical element of the Council's success. In a controversial setting, the support and assent of the major direct and indirect parties using the system are especially necessary. The pressures on the disparate interests and innate suspicions outside of the Council, particularly in controversial cases, would overcome even a brilliantly designed system if there was not agreement both on its value and on a clear set of procedures. If the system was not jointly "owned" as a result of the initial, and then later, charter discussions and by successful experience, any number of cases would have been too controversial to resolve. Parties could easily have backed away from the Council's recommendations.<sup>53</sup>

*F. The Use of Consensus, Joint Practices and a Problem Solving Orientation*

All of the casework described above relies on the Council's practice of performing tasks in a joint fashion. Data collection, interviews, and initial development of recommendations are all done in work groups composed to bring all perspectives to bear and explore any suspicions or uncertainties. Interviews, for example, during a case assessment are done with a three or four person subcommittee. Final actions are by consensus of the full Council.

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52. See BROCK, *supra* note 31, at 239-41, 248-51 (discussing the importance of neutral administration and staff competence).

53. See *id.*; see also Brock & Cornick, *supra* note 31, at 162 (discussing the need for agreement among the key parties).

Joint work at each step of the process has helped to ease another barrier: the cultural chasm between the world of the whistleblower and that of the company manager. The managers, engineers and other officials enter the process often with limited understanding of the mind set and experience of a potential or active whistleblower. The whistleblower and the interest group community enter with a limited idea of corporate dynamics and decision making. The constant joint work allows respective insights to develop and assist case resolution, and many actions and positions have been reversed or modified as a result. Individual neutrals and administrative bodies would have more difficulty in providing this dimension of insight and change in actions, particularly in real time.

The use of a consensus rule for all case actions means there are no winners or losers, making it easier to begin the next case. All members are bound by consensus decisions, and the manner in which the Council pursues consensus ensures that all members' issues are dealt with in the resolution. A perceptive memo on how a group works with its individuals in achieving consensus was prepared by Gerald Cormick, and has been a key guide for the group.<sup>54</sup>

#### *G. The Certainty of Implementation*

The concept of "presumptive implementation" was painstakingly developed by the knowledgeable parties in the charter discussions.<sup>55</sup> It was needed to deal with the practical and legal question of how to ensure implementation of the Council's recommendation, without violating the company's legal responsibilities under its contract. By pairing a consensus requirement<sup>56</sup> with presumptive implementation, companies are protected since consensus requires the assent of the company representatives, and the interest groups can be assured of a real commitment to the process. The Charter's exceptions clause<sup>57</sup> allows the company president to reject recommendations that violate safety or fiduciary responsibilities under the contract with the government; however, the company president must justify any rejections in writing.<sup>58</sup> The company would be retaining its legal responsibilities yet permitting the Council a full scope of review and recommendation by agreeing in advance to accept consensus recommendations but still fulfilling its contractual obligations. The risks to either party of

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54. See HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., POLICY & OPERATING GUIDELINES 3-5 (1995) (reprinting July 1993 Cormick memorandum outlining consensus process).

55. See CHARTER, *supra* note 21, § 2.6.

56. See *id.* § 2.5.

57. *Id.* § 2.6.

58. *Id.* § 2.7.

providing impractical recommendations or rejecting a practical one were seen as too great, making likely the workability of this implementation-consensus nexus.

Thus far, all recommendations have been accepted, but many have required significant inside mediation work to ensure that the features merited and gained acceptance and were free of legal or regulatory barriers. The practical guarantor of implementation, however, is the fact that there is agreement among individuals with the clout to make the implementation happen. The Council also has the chartered power to request a status report on items it has recommended. In several instances, the Council has exercised that prerogative.

#### *H. Constant Availability and Rapid Action*

Whistleblower disputes arise in many different ways, with different technical issues, under different supervisory arrangements and organizational cultures. This process can work on almost any issue, no matter how it arises or how it is packaged. All of the issues can be immediately and comprehensively transformed from an escalating circumstance to one of resolution primarily because there is a stable presence available with the flexibility to respond. Even a skilled mediator would take time to be brought into the scene. Also, a mediator would not have these tools or authority available, but would have to assemble them, if that were even possible, at the risk of further escalation. The continuity offered by this stand-by capacity is central to resolving complex conflicts that are at a flash point, and allows knowledge to build concerning how to address and resolve these disputes.

#### *I. Willingness to Trust the Process*

Trite though it may sound, the willingness of the interest group and corporate representatives to trust the process is critical. As with other dispute resolution systems or mediations, the real value emerges when everyone comes to the table focused on solving the problem rather than trying to "control" or steer the discussion to a particular conclusion. The parties on the Council have shown a real willingness to do that, although the buffeting at Hanford on other issues presents a constant challenge to the atmosphere of trust that allows risk-taking to occur in the Council. Some very complicated issues have been sorted out and consensus quickly reached by members combining their experience and insight into a fresh look at the problem. The independence of the forum and presence of senior leaders from each side with no history in the case allows a totally new look, free of pre-

vious positions, helping to avoid the temptation to steer the outcome. But risk-taking is still required.

#### IX. BENEFITS

Compared to the obviously available alternatives, this somewhat unusual process seems to provide useful benefits. For the government, it solves a previously unsolvable type of conflict representing an important public policy concern, namely that whistleblowers be able to express their views and have issues addressed without retaliation. The government is also concerned that the contractor not be diverted. Prior to this system, the complex cases at Hanford normally ended up in the courts, the press and the political process. Now, the issues are being handled quickly, close to the source, and with a minimum of conflict and diversion.

The time and cost savings have been quite substantial. The Council has worked on perhaps ten to twelve significant cases a year, each costing on average about one-sixteenth of what the same cases would have cost had they gone on in the old ways. For the companies, the indirect costs in management time used to be measured in months, and the issue lingered for years. Now cumulative management time can be measured in days and the diversion from corporate obligations to site operations is negligible. The reputations of supervisors and managers — and public confidence in the company or the government — are no longer affected by motions, depositions, news stories, or periodic legislative queries.

The Council membership and process allows the problem to be walked back to a point where the company plays a central role in resolving it so that the employee's legitimate interests are served without interfering with the company's contractual responsibilities. The Council system almost automatically creates learning among the company managers involved about how to better handle such issues and usually involves the straightforward correction of some safety practice or problem. There is real pride when managers, employees, and interest group representatives participate together to resolve a safety practice that benefits the mission and improves the safety of co-workers and others.

For the company there is a strong desire for closure. Many of the older whistleblower cases, predating the Council, lasted for almost a decade. Some of the conflicts related to several of those cases continue today. The Council system provides greater closure, possibly because of the broader scale of resolution allowed by the array of available tools, the fact that it creates agreed-upon outcomes without winners and losers, and the fact that implementation is overseen by company officials who helped shape the arrangements and is supported by key interest groups.

Certainly, the employee and the interest groups also benefit from closure. For an employee who has felt disrespected, there is the opportunity to participate professionally in solving the safety issue. Some employees have participated in preparing reports or briefings for senior managers as part of the resolution. In this less formal process, whistleblowers' attorneys observed far less uncertainty and anxiety, and for a shorter period of time, perhaps because of the speed, minimization of escalation, and direct participation. All of these limit the degree of isolation otherwise experienced. Stability of the outcome is assisted for both parties by the inclusion, as necessary, of a plan for reentry or restoration to the workplace.

The interest groups also benefit. They have long been pursuing full and fair resolutions. Now, they spend less time on the conflicting aspects of whistleblower cases. Rather, in addition to participation in addressing aspects of site safety, interest group representatives participate in an activity which helps to protect and strengthen the right of employees to question established practices. Unlike litigation and related settlements, the safety issue is always addressed. Because of the recusal and related safeguards, the interest group representatives can play their normal role in the DOE complex. The training program referred to above is an example of the positive, prevention oriented activities that can be spawned with their involvement and which go to the center of their organizations' goals.

#### X. REPLICABILITY

There is periodic discussion about replicability and whether this could be used in other corporate settings, inside or outside the nuclear industry where whistleblowing is a factor. Dr. A. Lamar Trego, president of Westinghouse Hanford when the Council was established, said of the Council system: "[I] view it as a fundamentally new management technique that will surely become the approach of choice by forward-thinking organizations striving to achieve maximum productivity with due regard for the safety of their workers and the environment."<sup>59</sup> Whistleblower advocates also are impressed with the system, and would like to see it used elsewhere.

The system seems to hold promise, but success is not automatic and depends upon the application of features and principles to a specific setting and expected issues. However, there are probably some common success factors: Any successful adaptation at another site or type of workplace would have to be a product of agreement between the relevant direct and indirect local parties who are concerned with these issues. Just as the Hanford parties had a lengthy period of discussion and frank exploration of what could work, the same type of exploration and agreement would be

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59. See REPORT OF THE HANFORD JOINT COUNCIL, *supra* note 5, at 11.

necessary elsewhere. Just as at Hanford, the discussions cannot simply be among professors at a nearby university, among DOE and company staff, or just among the interest groups; nor can it be just among the people regarded as "reasonable." All relevant direct and indirect parties, representing the most senior levels have to be in the same room, with a skilled convenor like Dr. Cormick, to explore the possibilities for agreement on a realistic system.

Even this early exploration process cannot be closely controlled by one of the parties, not even the government. To illustrate the sort of independence necessary, even at this stage, the work group that formed the Hanford charter was selected by Cormick — not by DOE, Westinghouse, or the interest group — after consulting with the interest groups, the company, and DOE. For a set of parties accustomed to trying to gain the upper hand, this degree of "letting go" is a risk that must be taken by everyone. The neutral has to work to lower those risks and build mutual confidence.

Any adaptation of the Council system would need to ensure that the new mechanism, its membership, and tools are congruent to the substantive, organizational, and political boundaries of the problems it will seek to resolve.<sup>60</sup> A proper membership structure possessing sufficient credibility and authority will be critical to provide the necessary tools, as will the quality of members chosen through a credible appointments process. The seats do not have to be exactly the same as at Hanford, but the seat composition must be agreed upon and relevant to the issues and implementation needs that will be encountered.

The system must be completely independent and have the necessary features to assure neutrality in practice and appearance. The specific features that assure neutrality can be different, but the assurance would be critical. There must be a clear grant of authority and operating funds, as well as mutually understood limits, regarding case handling and resolution, as in a charter. Without independence from governmental, corporate and interest group control, the system will not be trusted nor will it operate freely. Presumptive implementation or a similar guarantee of action would seem necessary, and consensus decision-making will prevent the system from breaking down and protect all parties.

Even at Hanford, when contractors changed, a significant period of discussion was required to develop renewed commitment and trust among a new set of players, and to make some adjustments in the charter to reflect relevant changes on the site. As one example, the feature of case-specific seats was added to provide for a representative from each of the major sub-

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60. See Brock, *supra* note 31, at 227-31; see also Brock & Cormick, *supra* note 31, at 163.

contractors. While the system at Hanford is designed and operated based on well-established dispute resolution principles, those principles are clearly adapted to the local circumstances and needs, and practices are periodically reviewed.

Since the format detailed in this Article has been established, any adaptation would not require the two years of "invention time" and preceding stages. However, the parties that will use the mechanism must be party to its creation, so there must be time to engage those individuals in substantive discussion and relationship building. Six to eighteen months would seem sufficient, rather than the three and a half years needed to start the first one of its kind.

Because the Council system does fill a need where most standard conflict resolution processes fail in safety-sensitive environments, the principles used here may well have value elsewhere. The system cannot be airlifted from Hanford to another site, but the materials and work done could be a starting point for joint discussions elsewhere. Such discussions will be productive if they yield a system that the parties are willing to trust sufficiently to allow its independence.<sup>61</sup>

#### XI. SUMMARY

By ensuring that the system itself is both a product of agreement, and a reflection of the key principles necessary, and by carefully forming the mechanism, the Council has worked successfully under three DOE Secretaries, two separate and differently structured contractor organizations, four CEOs, and several dozen cases. The Council has never failed to resolve a case in which it took jurisdiction, and can boast that no case within its jurisdiction at the time of occurrence has been the subject of litigation or controversy. It can also boast that it has resolved cases that were already in litigation or the newspapers. The Council has shown the ability to design special mediation processes for other kinds of cases and has sponsored preventive actions to contribute to site safety.

The Council system has been created without curtailing any rights or obligations held by employees or companies under current law or regulations. Company officials maintain their responsibilities for accomplishing the site mission, and interest group members are free to criticize site operations and related matters. All parties, however, are restricted from using information gained in Council work or from commenting to others or publicly on Council cases. Council generated information remains protected, yet all information regarding safety hazards is reported in the same manner

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61. See Brock & Cormick, *supra* note 31 at 164.

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that is required under laws related to nuclear facilities, and any other violations of law must be reported.

The system allows a broader range of tools than other available mechanisms in this arena. The range of action is made possible by pooling and focusing knowledge, stature and authority of senior company officials, interest groups, and selected community leaders under an agreed-upon charter, preferably at an early point in the conflict.

After a decade of conflict and deadlock, headlines and lawsuits, and millions of dollars expended in legal fees and settlements, the Joint Council system now achieves by agreement and consensus what eluded litigators, nuclear safety advocates, policy makers, corporate officials, capable managers, and front line employees acting on their own in the more fragmented legal and organizational setting typical of these conflicts. By the use of an agreed-upon and flexible system, a unified approach allows all of the factors — whether technical, historical, interpersonal or otherwise — to be taken into account and any reasonable tool can be applied in combinations and sequences that no existing forum permits for complex whistleblower cases. The system is faster, cheaper, and more effective in resolving such cases by orders of magnitude over the alternatives. The use of consensus and a commitment to presumptive implementation gives the system integrity and reliability for the interests of all parties.

While not yet fully developed, the Joint Council system seems to offer a useful application of alternative dispute resolution to obtain full and fair solutions to whistleblower conflicts, without legislation or regulation. This is accomplished by offering a special mediation instrument to fit a complex, and often controversial, safety-sensitive work setting.

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March 25, 2002

**Via Hand-Delivery**

The Honorable Richard A. Meserve, Chairman  
The Honorable Greta Joy Dicus  
The Honorable Nils J. Diaz  
The Honorable Edward McGaffigan, Jr.  
The Honorable Jeffrey S. Merrifield  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, Maryland 20852

Re: *The Role of the Commission: The Need for a Comprehensive Solution in  
Addressing Employee Concerns of Retaliation*

Dear Chairman Meserve and Honorable Commissioners:

Thank you for giving me the opportunity to meet with you about this important issue. By way of introduction, I have practiced before the Nuclear Regulatory Commission (NRC) and the Department of Labor (DOL) for almost twenty years on behalf of employees in the industry, as well as citizen and public interest groups. I am an active participant in the Employee Concerns Forum and was a member of the Independent Oversight Team for Safety Conscious Work Environment (SCWE) at the Millstone nuclear power plant between 1997 and 2000. I also provide consulting services to the industry on SCWE issues and training to managers on how to anticipate and prevent harassment, intimidation, retaliation and discrimination (HIRD) in the workplace. I have commented on, testified about, and participated in various task forces and studies on the Agency's handling of worker concerns and retaliation allegations since before there were any internal policies on these issues. I have also represented employees, under similar federal employee protection provisions, in other industries including chemical, oil, pipeline and environmental remediation businesses. In addition, since 1993 I have been involved in employee protection issues within the Department of Energy (DOE) complex. I am a charter member of the Hanford Joint Council for Resolving Employee Concerns, an alternative dispute resolution process for employees of contractors at the Hanford DOE site in Washington State. In short, I have substantial experience about this issue and consider myself qualified to address it.

The role of the NRC in responding to employee allegations of harassment, intimidation and retaliation has been the subject of internal debate, external criticism, public controversy, Congressional oversight hearings, media coverage, and litigation for almost the entire time that the commercial nuclear industry has existed. The last twenty years of progress in this area has been personally and professionally painful for many people, from employees who have suffered retribution for disclosing safety concerns to managers who have been accused of retaliation, whether ultimately judged guilty or innocent.

However, I would be remiss if I did not share with you my observation that the commercial nuclear industry is by far the most sophisticated in its treatment of employee allegations generally and complaints of HIRD specifically, and that the NRC's program for responding to employee allegations deserves to be commended for its work in this area. In particular, the Allegation Management Program under Ed Baker has become a respected and credible Agency initiative providing reliable information to employees, the public and the industry. He has been able to build consensus among stakeholders on many issues and provide respectful challenges to the industry and public interest community on others. His leadership will be missed as he moves to a new assignment. With his departure, I am concerned that the focus and direction of the Commission may shift away from finding a comprehensive agency solution to the issues presented by the challenges of employee allegations of retaliation and "chilling effects" resulting from poor work environments.

#### *Summary of Position*

It is my belief that the role of the NRC is to ensure that there is a free flow of information to the government about issues that have the potential to impact public health and safety. It is my experience that this free flow of information can be interrupted from situations as diverse as an entire corporate culture that rewards harassing and intimidating behaviors to the misconduct of a single manager. It is also my observation that the public is best protected when there is an atmosphere of mutual trust and respect between employees and their managers on issues that have the potential to impact safety.<sup>1</sup> There is a fundamental disagreement between the industry and the stakeholder community about how the NRC should implement its responsibilities -- the industry prefers to monitor itself and does not believe employment issues should be the subject of NRC regulation or interference, while most of the public interest or employee protection stakeholders

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<sup>1</sup>The Discrimination Task Force draft report agrees with this position, stating "[t]he Task Group believes that the existence of a safety conscious work environment and the ability of individuals to engage in protected activities directly contributes to the Agency's mission of protecting public health and safety and the Agency's goal of enhancing public confidence." Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints, April 2001, at 9. Additionally, the nuclear industry agrees with this position, as stated in its Statement of Industry Principles, "A safe and successful commercial nuclear program depends on a work environment in which the workforce freely identifies and communicates safety concerns to management."

believe the Agency has a responsibility to become an active participant in mitigating and resolving cases of alleged retaliation.

I am dismayed by the present state of confusion and disagreement on what the role of the Agency is and should be in this regard, and fear that the focus is being lost among the task forces, rule making activities, enforcement action controversies, and industry and stakeholder disputes. Through this letter I am urging the Commission to request that the Staff, with input from the industry and stakeholders, develop a comprehensive recommendation on how the NRC should meet its responsibility to the public in this regard.

At present there are at least six distinct policies, proposals and issues in various stages of implementation, discussion, consideration, rejection and controversy about the appropriate role of the NRC in responding to allegations of employment retaliation.<sup>2</sup> The most recent iteration of this debate is the draft Discrimination Task Force (DTF) report, which is in the process of being finalized and submitted to the Executive Director of Operations (EDO). As I understand it, the EDO will then review the DTF's final report and submit a position paper to the Commission for its consideration.

I urge the Commission to require the Staff to go beyond the DTF's efforts and provide a comprehensive recommendation to the Commission on how all of the "pieces of the puzzle" fit together to ensure that the free flow of information about potential nuclear safety problems is protected at all times.<sup>3</sup>

While the DTF did collect substantial information in one place about the history of employee discrimination issues and various issues arising from the handling of employee allegations of retaliation, it did not incorporate the extensive work that has also been done in other forums, i.e., the significant work done on Safety Conscious Work Environment issues at Millstone, the response to the proposed rulemaking on mandated management training on 10 CFR 50.5 and 50.7, the ongoing proposals and debate on the role of Alternative Dispute Resolution with respect to employee discrimination, the current role of licensee employee concerns programs, the programmatic lessons from the Agency's allegation management program, the handling of enforcement in discrimination cases, and the highly controversial role of the Office of

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<sup>2</sup>Those are: 1) the evaluation of the potential use of Alternative Dispute Resolution (ADR) in its enforcement program; 2) the current Safety Conscious Work Environment Policy, 61 FR 24336, effective May 14, 1996; 3) the Petition for Rulemaking Employee Protection Training submitted by the Union of Concerned Scientists, PRM 30-62, docketed August 13, 1999; 4) the consideration of whether the Commission should take a risk-informed approach to allegation management, see SECY-00-0177 disapproving such approach; 5) the role of the OI in connection with the investigation and prosecution of discrimination; and 6) the activities of the DTF.

<sup>3</sup> While I have strong views on many of the elements of the DTF report, I have not attempted in this letter to detail or explain those views.

Investigations (OI) in addressing employee allegations of retaliation and making determinations on the existence of a SCWE.

The DTF did not attempt to address the important lessons learned from actual cases in which retaliation has occurred, or in which a "chilling effect" contributed to a timely failure to identify nuclear safety related concerns. The DTF did not look, except perhaps anecdotally, at what has been successful in restoring work environments plagued by "whistleblower" allegations and a breakdown in public trust. The DTF did not address the issues through the lens of how will a particular recommendation protect and encourage an environment in which all employees will raise concerns. Instead the DTF only looked at the present regulatory process and procedural issues arising from the point an allegation is made and whether the Agency should do things differently. This focus was too narrow to justify more than maintaining the essential *status quo*.

The question that should drive the Commission's consideration is simple:

Does the current NRC process work to ensure that there is a continual free flow of information from the workforce to the company, and/or to the government? If not, how should the process be changed to accomplish that objective?

It is my observation that the processes the NRC is currently relying upon to address allegations of HIRD do not give assurance to the Commission or the public that the free flow of information continues regardless of the circumstances or ultimate outcome of a HIRD allegation. I believe a process can be adopted that addresses the fundamental issues of ensuring the free flow of information, while at the same time providing timely and effective responses to the impacted employee and fundamental fairness to the accused.

I urge the Commission to request that the EDO provide a comprehensive model for addressing issues of alleged retaliation, and address issues not addressed or explained by the DTF in their recommendations, such as:

- 1) Does the current inspection program ensure that the free flow of information exists at licensed facilities or activities? If the Staff believes it does, explain how it does so. Apply that rationale and explanation to those sites that have been the subject of substantial HIRD allegations, or substantiated HIRD allegations, over the past five years. If the Staff does not believe it does, how should it do so?
- 2) For those sites that have been determined to have a less than acceptable safety conscious work environment in the past five years and then recovered, what are the common elements of their recovery efforts? What role did the NRC play in that recovery?
- 3) For each individual case of substantiated retaliation under 10 CFR 50.7 and 42 USC Section 5851 in the past five years, what action, if any, was taken to

determine the impact of the HIRD event on others at the time of the event? What was the determination? Were there other incidents of HIRD during the pendency of the case? What actions were taken by the licensee to mitigate the impact of the HIRD event? What involvement did the NRC have in responding to the event?

- 4) For each OI investigation into allegations of HIRD, what findings did they make on whether the event created a "chilling effect" on others, impacted the safety-conscious work environment of the site, or otherwise addressed the cultural issues identified as the root cause of the issue under investigation. Assuming that OI found any case of a "chilling effect", what actions did they take to address that finding? What were the results of that action?
- 5) For each substantiated complaint of HIRD filed with the DOL or the NRC within the past five years, was the issue first raised to line management? If so, was the action taken by line management timely, responsive and appropriate? If not, what was missing in the process that prevented the licensee from recognizing and responding to the event appropriately? What process was changed to remedy that situation?
- 6) Has the Staff ever made a determination of the level of understanding of managers and supervisors at any licensed facility of their responsibilities under 10 CFR 50.7 and how it is implemented prior to a HIRD complaint being filed? If not, what is the basis for their acquiescence to the position that some form of training in SCWE and HIRD should not be required?<sup>4</sup>
- 7) What actions can the Staff take to encourage and ensure the most timely, effective and least disruptive resolution to allegations of HIRD? How have other alternative dispute resolution processes, such as the Hanford Joint Council within the DOE complex, worked to find timely solutions to resolving HIRD allegations and

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<sup>4</sup> While the industry has taken a very strong position that mandatory training is not appropriate, it has been my experience – every time – that when I provide training to managers and supervisors there is widespread misunderstanding or lack of understanding of their responsibilities under 10 CFR 50.7, the details of how HIRD is determined, or what the expectations are that apply to them in making personnel related decisions that have the potential to be adverse and impact or interrupt the free flow of information. The Agency has, to date, taken no position on whether training should be mandated on 10 CFR 50.7 requirement. It should be noted that the single most important factor at Millstone in the recovery efforts of SCWE was training of managers and supervisors. See, *Common Cause Analysis of Millstone SCWE Performance*.

addressing the impact of those events on the workforce?<sup>5</sup>

These questions would provide a valuable information data base to consider in designing a new path forward.

My review of the DTF's draft report demonstrates that many issues were often dismissed without adequate treatment. For example, on the potential use of ADR in connection with employee discrimination claims the DTF draft report inexplicably concludes "[t]he use of ADR misses the point of the NRC's interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process." This statement reveals that there was little understanding of the significant role that ADR can play in the early resolution of employee concerns about HIRD and its implication. Its dismissal out of hand ignores that the DOE, which has exactly the same public health protections and issues as the NRC, states that a "vital part" of its Employee Concerns program's objective is to "avoid, where possible, prolonged and costly litigation by promoting the use of Alternative Dispute Resolution (ADR) including mediation." See, *1999 Annual Employee Concerns Program Activity Report*, U.S. Department of Energy, Office of Employee Concerns, p.2. In addition, the Hanford Joint Council, an alternative avenue for employees to pursue issues outside of litigation, also addresses the underlying causes, behaviors or events that led to an allegation of retaliatory action in resolving employee issues, and does so in a comprehensive manner. The Council process relies upon a panel of industry, stakeholder, and independent members reviewing a case and helping achieve full, fair and final resolution of disputes based on claims of retaliation. This approach was endorsed and funded by the DOE as an experimental alternative to resolving employee concerns.

On the issue of whether the Agency should develop a rule regarding a SCWE, the DTF concludes, without explanation, that promulgating a rule requiring a SCWE would be extensive ... resource intensive and very difficult to develop and implement." The DTF claims that the Agency can achieve the same result by reliance upon the use of "OI investigations to help address safety conscious work environment ..." In fact, the report states that "[t]he primary means the NRC uses to assess SCWE is through the investigation of individual complaints of discrimination by the Office of Investigations." Draft Report, at 12. My personal view is that relying upon OI to perform the dual function of investigating alleged deliberate wrongdoing and also making a determination on what was the impact of that wrongdoing is itself close to a conflict of

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<sup>5</sup> The DTF draft report incorrectly states, at 10(G) that "[o]ther regulatory agencies refer individuals alleging discrimination to OSHA and do not conduct independent inspection, investigation or enforcement activities. Nor do they consider the impact that findings of discrimination have on the work environment." For, at least, the DOE, that is not true. The DOE Office of Employee Concerns requires its contractors to address the impact of alleged retaliation and can take action under the terms of the contract. See, generally, Employee Concerns Program and DOE Guide 442.1-1 and 10 CFR Section 708.

responsibilities. OI is an independent arm of the Agency developed to provide investigators with the skills necessary to investigate and develop potential criminal prosecutions, not the training or background to evaluate cultures and work environment issues.

On the issue of the mandatory training the DTF rejects the concept that mandating training would change the situation, but the Millstone experience demonstrates just the opposite. On the question of whether there is any "reverse chilling effect" of potential personal liability on managers in the industry it simply states it "found no evidence" of that impact, without any explanation of what it based that decision on.

While I have not attempted to detail all of the solutions or ideas that the DTF short-circuited, the Commission should recognize that the DTF gave inadequate treatment of available options outside the present paradigm. I am convinced, because I have witnessed success in other forums, that a better plan can be crafted that honors the responsibilities and limitations of the Agency, the needs and realities of the employee and manager in the workplace, and works better to protect the public health and safety than the pieced together approach that the Agency is currently relying upon.

#### *A Comprehensive Solution is Necessary*

The problem with the present Agency approach is that it can never work successfully – a Staff investigation or inspection to determine whether discrimination has occurred can simply never substitute for an evidentiary hearing in which issues of the motive or intent are played out in a forum designed to determine the truth behind peoples' motives and actions. And, waiting for the result of any type of adjudication or investigation before addressing the impact of an alleged act of retaliation, will always be too late to avoid the potential "chilling effect" on the workplace caused by a perception of retaliation. Any variation on the same theme will simply "rearrange the deck chairs on the Titanic" and will be doomed to failure.

Employees who have been the subject of retaliation for raising safety concerns or providing information to the NRC must be "protected," which is not necessarily the same thing as providing someone a personal remedy. Managers and supervisors who engage in retaliatory actions must be held accountable, which is not the same thing as being subjected to "star chamber" determinations or personal criminal liability. Licensees should be expected to develop and maintain work environments in which employees are willing to raise concerns and do so without fear of reprisal, and be required to demonstrate that it has done so. Every effort and incentive should be focused on stabilizing the work environment and addressing the potential chilling effect on others resulting from an "initiating event."<sup>6</sup> Regulatory attention should be on encouraging timely and effective resolution to employee concerns, intervening to protect the free flow of information, rewarding appropriate mitigation efforts and encouraging business

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<sup>6</sup> An "initiating event" is any activity, event, or adverse action that, taken in context, has the potential to be perceived by others as a retaliatory adverse action.

management behaviors and actions that focus on the SCWE implications of any alleged adverse action. The success of these efforts will continue to reduce the number of cases that require active litigation and focus the Agency's resources on prevention.

When the inevitable event occurs that dictates intervention, the Agency is fully empowered to take all necessary action. The industry is fully capable to address the potential impact on a workforce resulting from "initiating events" of alleged retaliation without regard to the ultimate outcome of allegations of retaliation investigation. Doing so requires a recognition that the result of a fundamentally fair process will never be timely enough to respond to the potential "chilling effect" of the event on the workforce. The track from alleged retaliatory adverse action to personal remedy achieved in a Department of Labor adjudicatory forum, a civil case, or through any other alternative dispute process of settlement may take days or years. An OI investigation will take between nine months to several years. Even an ADR process would, likewise, be more time consuming than prudent. The determination of the impact of the initiating event on the workforce should be almost immediate, and in no case longer than a week to ten days.

In conclusion, I respectfully suggest that the Commission request the Staff to provide a comprehensive model that integrates all of the elements of allegation management arising from claims of retaliation – from safety conscious work environment expectations, training, employee concern/alternative avenue program activities, and the role of OI investigations. In addition, I urge the Commission to issue a challenge and request to the industry and public stakeholders to participate with the Staff in proposing a comprehensive model, or propose alternative plans if agreement is not possible. The issue is too important to get wrong.

Sincerely,



Billie Pirner Garde

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